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S E C R E T STATE 051364

LIMDIS - JOINT STATE/DEFENSE MESSAGE

E.O. 11652: GDS

TAGS: MARR, PFOR, PBOR, MOPS, KS

SUBJECT: FEBRUARY 26 YELLOW SEA INCIDENT

REFERENCE: CINCUNC 282310Z FEB 75

1. WE APPRECIATE CONSIDERATIONS CITED REFTEL. WE FURTHER
RECOGNIZE THAT NO BOARDING OR SEIZURE DID IN FACT TAKE
PLACE AND THAT SINKING OF NORTH KOREAN SHIP WAS THROUGH
INADVERTENT COLLISION.

2. AT THE SAME TIME, THERE IS NO JUSTIFICATION UNDER
INTERNATIONAL LAW FOR BOARDING OR SEIZURE OF VESSELS ON
HIGH SEAS EXCEPT IN THE MOST NARROWLY DEFINED INSTANCES
AS SPECIFIED BY CONVENTION OR INTERNATIONAL TREATIES.

3. THE CONVENTION ON THE HIGH SEAS, CONCLUDED UNDER U.N.

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AUSPICES, IS PRIMARY CODIFICATION OF INTERNATIONAL LAW IN

THIS AREA. US IS A PARTY TO THE CONVENTION AND ALTHOUGH NEITHER ROK NOR NK IS A PARTY, WE CONSIDER THEM BOUND BY PRINCIPLES OF INTERNATIONAL LAW CODIFIED THEREIN.

4. IN THE EXERCISE OF ITS INTERNATIONAL LAW RIGHT OF QUOTE APPROACH AND IDENTIFICATION UNQUOTE, A WARSHIP MAY APPROACH AND CHALLENGE (CHALLENGE IN THIS SENSE IS LIMITED TO RIGHT TO REQUEST ID BY TRANSMITTING AA FROM INTERNATIONAL CODE OF SIGNALS OR BY OTHER APPROPRIATE MEANS) WITH

RESPECT TO AN UNIDENTIFIED VESSEL ON THE HIGH SEAS. (OBVIOUSLY A VESSEL CLEARLY IDENTIFIABLE AS A WARSHIP OF A FOREIGN STATE IS NOT AN UNIDENTIFIED VESSEL.) THERE IS, MOREOVER, NO CORRELATIVE DUTY UPON THE CHALLENGED VESSEL TO RESPOND IN ANY PRESCRIBED MANNER, OR INDEED TO RESPOND AT ALL. AS YOU KNOW, US SHIPS ROUTINELY IGNORE CHALLENGES FROM PRC SHORE INSTALLATIONS WHILE ENTERING HONG KONG. THIS RIGHT OF APPROACH AND CHALLENGE DOES NOT INCLUDE THE RIGHT TO HAZARD THE VESSEL OR DIRECT ITS COURSE.

5. IF THE VESSEL IS A WARSHIP, SUCH VESSEL IS, UNDER ARTICLE 8 OF THE CONVENTION, COMPLETELY IMMUNE FROM THE JURISDICTION OF ANY STATE OTHER THAN ITS FLAG STATE. IN PARTICULAR THERE IS NO RIGHT OF VISIT AND SEARCH OF A FOREIGN WARSHIP. IN THIS CONNECTION, A WARSHIP IS DEFINED BY ARTICLE 8 OF THE CONVENTION AS QUOTE: A SHIP BELONGING TO THE NAVAL FORCES OF A STATE AND BEARING THE EXTERNAL MARKS DISTINGUISHING WARSHIPS OF ITS NATIONALITY, UNDER COMMAND OF AN OFFICER DULY COMMISSIONED BY THE GOVERNMENT, WHOSE NAME APPEARS IN THE NAVY LIST, AND MANNED BY A CREW WHO ARE UNDER REGULAR NAVAL DISCIPLINE -- UNQUOTE. DETERMINATION WHETHER APPROACHED VESSEL IS A WARSHIP MAY ON OCCASION BE DIFFICULT FOR THE RESPONSIBLE COMMANDER; SINCE SOME ELEMENTS OF ARTICLE 8 DEFINITION ARE NOT VERIFIABLE BY OBSERVATION IN ANY EVENT. UNDER CONDITIONS OF RESTRICTED VISIBILITY, AND DEALING WITH SMALL PATROL-TYPE CRAFT, JUDGMENT IS PARTICULARLY DIFFICULT AND IS RECOGNIZED AS SUCH. NEVERTHELESS, EXERCISE OR ATTEMPTED EXERCISE OF JURISDICTION OVER A FOREIGN

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WARSHIP ON THE HIGH SEAS IS A SERIOUS BREACH OF INTERNATIONAL LAW AND CUSTOM. ACCORDINGLY, A HIGH DEGREE OF CIRCUMSPECTION IS REQUIRED IN MAKING THIS DETERMINATION. THE VESSEL'S GENERAL CONFIGURATION AND APPEARANCE, THE PRESENCE OF EXTERNAL ARMAMENT OR DISTINGUISHING MARKINGS, ENSIGN DISPLAYED, AND RESPONSE, IF ANY, TO CHALLENGE ARE ALL RELEVANT CIRCUMSTANCES TO BE TAKEN INTO ACCOUNT.

6. EVEN IF UNIDENTIFIED VESSEL IS DETERMINED NOT REPEAT NOT TO BE A WARSHIP, NO AUTOMATIC RIGHT OF VISIT AND SEARCH ARISES, EVEN IF VESSEL IGNORES CHALLENGE. UNDER ARTICLE 22 OF THE CONVENTION, SUCH RIGHT ARISES ONLY IF THERE ARE REASONABLE GROUNDS FOR SUSPECTING PIRACY, SLAVE TRADE, THAT THE VESSEL IS REALLY OF THE SAME FLAG AS WARSHIP CHALLENGING IT, OR IF FLAG STATE OF CHALLENGED VESSEL HAS BY TREATY CONFERRED SPECIAL POWERS ON CHALLENGED VESSEL. REFUSAL TO DISPLAY ANY NATIONAL ENSIGN

IN RESPONSE TO A CHALLENGE IS ONLY ONE CIRCUMSTANCE TO BE CONSIDERED IN DETERMINING WHETHER VESSEL FALLS INTO ONE OF ABOVE CATEGORIES.

7. ARTICLE 23 OF CONVENTION AUTHORIZES HOT PURSUIT OF FOREIGN VESSELS ON HIGH SEAS ONLY WHERE PURSUING STATE HAS GOOD REASON TO BELIEVE ITS LAWS AND REGULATIONS HAVE BEEN VIOLATED AND IF PURSUIT IS COMMENCED WHEN FOREIGN SHIP WAS WITHIN ITS INTERNAL WATERS, TERRITORIAL SEA OR CONTIGUOUS ZONE (LIMITED TO 12 NAUTICAL MILES). SINCE HOT PURSUIT CONTEMPLATES ULTIMATE ARREST OF FOREIGN VESSEL, AND SINCE WARSHIPS ARE NOT SUBJECT TO ARREST, HOT PURSUIT DOES NOT APPLY TO WARSHIPS.

8. FOREGOING, OF COURSE, DOES NOT AFFECT RIGHT OF A VESSEL OR AIRCRAFT TO DEFEND ITSELF WHEN VESSEL, AIRCRAFT, OR COASTAL STATE IS UNDER ATTACK.

9. WE DO NOT REPEAT NOT CONSIDER THAT ARMISTICE CREATES EXCEPTIONS TO CONVENTION AND INTERNATIONAL LAW WITH RESPECT TO BOARDING OR BRINGING IN FOREIGN VESSELS ON HIGH SEAS, NOR ARE WE AWARE OF ANY CUSTOMARY INTERNATIONAL PRACTICE WHICH WOULD PERMIT, DESPITE CONVENTION, SUCH
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ACTIONS. WE ARE WELL AWARE THAT HOSTILE ACTS BETWEEN TWO SIDES CONTINUE DESPITE ARMISTICE. ARMISTICE NEVERTHELESS REMAINS IN FORCE, AND IT WOULD BE MOST DIFFICULT TO ALLEGE SOME SPECIAL BELLIGERENCY RIGHTS SUCH AS VISIT AND SEARCH UNDER OR OUTSIDE ARMISTICE IN LIGHT OF OUR PAST PUBLIC POSITION IN CASES SUCH AS PUEBLO AND FEBRUARY 15, 1974 INCIDENT.

10. ASIDE FROM LEGAL CONSIDERATION INVOLVED, THE SEIZURE OR SUCCESSFUL BOARDING WOULD HAVE CREATED SERIOUS POLITICAL PROBLEMS. SEIZURE WOULD HAVE CONSTITUTED APPARENT PARALLEL TO NK ACTIONS IN CASE OF PUEBLO AND ROK FISHING BOATS ATTACKED FEBRUARY 15, 1974. IN BOTH INSTANCES WE RAISED STRONG PROTEST OVER SEIZURE ON HIGH SEAS IN CASES WHERE VESSELS WERE OUTSIDE TERRITORIAL

WATERS, BUT MUCH CLOSER TO NK MAINLAND. OTHERS WOULD BE QUICK TO CITE THE APPARENT INCONSISTENCY. GLOBAL MOBILITY OF US NAVAL AND MERCHANT FLEET DEPENDS IN LARGE MEASURE ON STRICT OBSERVANCE OF INTERNATIONAL LAW EVEN WHEN SUSPICIOUS OF A VESSEL'S INTENT.

11. MORE IMMEDIATE PROBLEM WOULD HAVE BEEN CHARGES RELATIVE TO UNITED NATIONS COMMAND ROLE AND AUTHORITY. LEGITIMACY OF PRESENT UNC RELATIONSHIP CAME UNDER STRONG

ATTACK IN UNGA LAST YEAR AND WE CAN EXPECT SIMILAR MOVE THIS YEAR. PLAUSIBLE CHARGES THAT US WAS EXCEEDING ITS ROLE AS UNC IN SUPPORT OF ROKG FISHING OR QUOTE OPERATIONAL WATERS UNQUOTE CLAIMS WOULD BE HIGHLY DAMAGING TO US/ROK POLITICAL INTERESTS IN UNGA AND DIFFICULT IF NOT IMPOSSIBLE TO COUNTER.

12. IN THIS REGARD, IT IS IMPERATIVE THAT ALL CONCERNED AVOID US INVOLVEMENT IN FUTURE ACTIONS WHICH APPEAR TO VIOLATE ACCEPTED PRINCIPLES OF INTERNATIONAL LAW AND INSURE THAT ROK FORCES DO NOT PARTICIPATE IN SIMILAR ACTIONS WHILE UNDER UNC CONTROL. YOU SHOULD EXERT APPROPRIATE INFLUENCE TO DISCOURAGE ROKG FROM UNILATERALLY PARTICIPATING IN SUCH ACTIONS AS WELL.

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